No. 14,919

IN THE

United States Court of Appeals

For the Ninth Circuit

LOUIS E. WOLCHER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR THE UNITED STATES.

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JURISDICTIONAL STATEMENT.

An indictment was returned against appellant, Louis E. Wolcher, on October 4, 1950 in the Southern Division of the Northern District of California, charging him, in one count, with wilfully and knowingly attempting to evade and defeat income taxes due and owing for the tax year ended June 30, 1944, in the amount of $30,949.81, in violation of Section 145(b), Internal Revenue Code of 1939.

On January 18, 1951 appellant entered a plea of not guilty. A trial was held, and on May 4, 1951 the jury returned a verdict finding the appellant guilty as charged. The conviction was reversed by

this court on November 17, 1952, *Wolcher v. United States,* 200 F. 2d 493.

Thereafter appellant was retried before the Honorable Louis E. Goodman on August 31, 1953 and the jury again returned a verdict of guilty. The conviction was affirmed by this court, *Wolcher v. United States,* 218 F. 2d 505 and petition for certiorari was denied by the Supreme Court of the United States, 350 U.S. 822.

On September 2, 1955 appellant moved the District Court for a new trial on grounds of newly discovered evidence. The motion was denied and this appeal is from the order of denial. A timely notice of appeal was filed and it is conceded that this court has jurisdiction to hear and decide the appeal.

STATEMENT OF FACTS.

A.- General background.

The evidence at the second trial of this case disclosed that during the fiscal year ended June 30, 1944 appellant Wolcher was the sole owner of a coin operated machine business, and in addition, had partnership interests, in varying percentages, in a number of other businesses including several bars.

During the last half of 1943 he engaged in transactions involving some 5138 cases of whiskey, a commodity then in very short supply, and capable of commanding a price far above the ceiling price imposed by law. By arrangement between appellant and two

licensed liquor wholesalers in San Francisco, some 1174 cases (or less) of the whiskey were sold by the wholesalers to various persons at ceiling prices. In these transactions the purchasers paid the wholesalers directly and received delivery of the whiskey from the wholesalers. Appellant did not appear in these transactions.

Some 200 cases of the whiskey were not sold during the tax year involved here and remained in appellant's inventory at the end of that year.

All the rest of the whiskey was sold by appellant on the black market. Exactly how many cases were so sold cannot be determined, but it is certain that at least 3764 cases were sold at over-ceiling prices.[1]

In accomplishing these black market sales, appellant and his agents charged prices of $72.40 a case for 300 cases, $55.00 a case for 68 cases, and $60.00 a case for the balance. The pattern of these sales was to require the buyer to pay the invoice, or ceiling, price (which averaged about $32.60 per case) by a check payable, and later delivered, to the licensed wholesaler. The balance was required to be paid in cash, and was received by appellant. None of the cash money received by him on these transactions was deposited in any of his bank accounts, no record of it was retained, no record of the sales was made on any of appellant's books of account, and none of

[1]There may have been more, since at the second trial of the case, appellant testified that 1174 cases had been sold at ceiling prices, whereas at the first trial he thought it was only about 900 cases sold at ceiling prices.

the profit on the transactions was included in his income as reported on his income tax return.

Appellant's defense was that he made no profit on these transactions because he had sent all of the cash he received to one William Gersh as a bonus for locating the whiskey. Gersh was not a witness at the second trial of the case although he had been at the first trial, where he denied receiving any money from appellant for the purpose of obtaining whiskey. At the first trial one Francis Mayer testified (pp. 402-407, Transcript of record, first trial, No. 12992) that he had shipped to the wholesaler in San Francisco 1,000 cases of the whiskey ultimately sold by appellant and that these shipments followed a conversation he had with Gersh. Mayer was subpoenaed as a defense witness for the second trial but was not called, nor was his testimony from the first trial introduced in evidence even though Government counsel offered to stipulate that it might be (pp. 455-456, Transcript of Record, second trial, No. 14109).

B. The motion for new trial.

Just within two years after the date of final judgment, appellant moved for a new trial on the ground of newly discovered evidence, pursuant to Rule 33, Federal Rules of Criminal Procedure. The motion was supported by two affidavits, one of Edwin F. Corriston and the other of Murray M. Chotiner. Corriston's affidavit, which related certain conversations he allegedly had with William Gersh and with one Garry Taylor, may be summarized as follows:

At the first conversation, in the spring of 1943, Gersh said that he had been in touch with Wolcher, that Wolcher and some taverns on the west coast, that Wolcher was having difficulty obtaining whiskey, that Gersh had received cash from Wolcher for the purpose of making over-ceiling payments to obtain whiskey, that Gersh didn't know where to get whiskey and that Gersh desired Corriston to get a quantity of whiskey for Wolcher. During the course of this conversation Gersh exhibited a wad of hundred dollar bills. Corriston told Gersh that he believed he might be of help, and he called Gersh back a few days later and told him to contact Frank Mayer and that Mayer would be expecting to hear from him.

During the summer Gersh told Corriston the contact was working out well. Some months thereafter there was a further conversation in which Gersh said that the previous contact petered out, that Wolcher needed more whiskey, and that he would again appreciate Corriston's help. A few days later Corriston told Gersh to contact a Garry Taylor, who, in a later conversation between Corriston and Taylor, said that $50,000 cash would be needed. Thereafter Corriston had a further conversation with Gersh in which Gersh said he had received plenty of cash from Wolcher.

Thereafter, there was a conversation between Taylor, Gersh and Corriston in which Taylor again demanded $50,000, and in which Gersh said he had the money. Taylor asked for $10,000 and Gersh handed Taylor an envelope which he said contained "ten big ones." Thereafter, in separate conversations, Taylor told Corriston that every-

thing was okeh and Gersh told him it was a very good contact.

The affidavit of Murray M. Chotiner relates a conversation with the United States Attorney for the Northern District of California, who was alleged to have said, after the second trial, "We have evidence that the money Wolcher paid to Gersh was passed on to people very high in the syndicate, who had no relation or contact with Wolcher, with very little, if any, of the money being retained by Gersh."

In a counter-affidavit the United States Attorney stated that he had numerous conversations with various attorneys for appellant, including a conversation with Chotiner; that he has no recollection of the exact words used during his conversation with Chotiner, but that he did not intend to convey, nor did he believe that he did convey, the impression that there was any evidence concerning the relationship between Wolcher and Gersh that was not known to the defense, although he had been aware of, and had undoubtedly referred to, the suspicions, rumors, and speculations concerning Gersh which he had frequently discussed with Mr. Leo Friedman and with other representatives of the defense.

The United States Attorney affirms that he has no knowledge of any evidence, other than the testimony adduced at the trial, to the effect that Gersh was engaged in black market liquor transactions, or to the effect that Wolcher made any payments to Gersh for the purpose of acquiring black market liquor.

The United States Attorney's affidavit was not controverted.

QUESTION PRESENTED IN THIS CASE.

The only question presented on this appeal is whether or not the District Judge abused his discretion in denying appellant's motion for a new trial on the ground of newly discovered evidence.

ARGUMENT.

THE DISTRICT JUDGE RULED CORRECTLY THAT THERE WAS NO LEGAL BASIS FOR GRANTING A NEW TRIAL.

The District Court order denying motion for a new trial, dated September 12, 1955, reads as follows:

> "The motion of defendant for a new trial on the ground of newly discovered evidence, filed herein on September 2, 1955, supported by affidavits of Edwin M. Corriston and Murray M. Chotiner and argued and submitted to the court, in my opinion, fails to set forth any legal basis for granting a new trial to the defendant on the ground of newly discovered evidence.
>
> Consequently, the motion for a new trial is hereby denied."

It is well settled that a motion for new trial based on allegedly newly discovered evidence is directed to the discretion of the trial judge and is reviewable only for manifest abuse.

Balestreri v. United States, 9th Cir. 1955, 224 F. 2d 915;

United States v. Hack, 7th Cir. 1953, 205 F. 2d 723, cert. den., 346 U.S. 875;

Grover v. United States, 9th Cir. 1950, 183 F. 2d 650;
United States v. Cordo, 2d Cir. 1951, 186 F. 2d 144, cert. den., 340 U.S. 952.

The reviewing court must assume that the trial judge, in denying a motion for new trial on such grounds, found the facts against the accused. *Jefferies v. United States,* 9th Cir. 1954, 215 F. 2d 225.

The Supreme Court has warned that courts must be on the alert to see that the motion for new trial on the ground of newly discovered evidence be not abused. *United States v. Johnson,* 1946, 327 U.S. 106, reh. den., 327 U.S. 817. Accordingly, the burden upon the moving party is a formidable one. He must satisfy the trial court that there is new evidence, that it came to his attention after the trial, that his failure to learn about it sooner was not due to any want of diligence, that the evidence is material to the issues involved, that it is of such a nature that it would probably produce an acquittal, and that it is not merely cumulative or impeaching. *United States v. Johnson,* 7th Cir. 1944, 142 F. 2d 588, cert. dism., 323 U.S. 806; *Balestreri v. United States,* supra; *Weiss v. United States,* 5th Cir. 1941, 122 F. 2d 675, cert. den., 314 U.S. 687, reh. den., 314 U.S. 716; *Wagner v. United States,* 9th Cir. 1941, 118 F. 2d 801, cert. den., 314 U.S. 622, reh. den., 314 U.S. 713. The heavy burden imposed upon the movant makes it clear that new trials on ground of newly discovered evidence are not favored in the law. *Casey v. United States,* 9th Cir. 1927, 20 F. 2d 752, affirmed 276 U.S. 413.

A. THE MOTION FOR NEW TRIAL WAS NOT DENIED ON THE GROUND THAT THE EVIDENCE TENDERED WAS NOT ADMISSIBLE, NOR ON ANY NARROW GROUND.

Appellant concedes that ordinarily the granting or denial of a motion for new trial rests in the sound discretion of the trial court, and will be reviewed only for abuse of such discretion. Appellant contends, however, that in the present case the District Judge based his denial upon the inadmissibility of the Corriston affidavit, and, therefore, that he, in effect, failed to exercise his discretion.

The record completely fails to support appellant's construction of the basis of the ruling by the District Judge. A reading of the order denying motion for a new trial not only fails to show the exclusion from consideration of either of the affidavits, but affirmatively shows that the District Judge considered the motion to be "supported by affidavits of Edwin M. Corriston and Murray M. Chotiner." Nowhere in the order, nor in any of the court's comments during argument, can there be found the slightest suggestion that the court intended to disregard any of the showing made by the moving party. Appellant simply failed to convince the trial judge that he was entitled to a new trial under the law. As the trial judge said (R. 57), "You cannot treat a motion for a new trial in the abstract. It has to be something that is related to the evidence in the case." See also *Balestreri v. United States,* supra, where this court said, at page 917, "The trial judge, in determining the impact of the newly discovered evidence, may utilize the knowledge he gained from presiding at the trial

as well as the showing on the motion." It cannot be presumed that the District Judge did otherwise here.

It seems clear that the court was satisfied, in the light of the evidence adduced at the trial, that the so-called newly discovered evidence, even if it were not cumulative, even if it were admissible, and even if it were newly discovered, was not so material that it would probably produce a verdict for the defendant were the case to be retried.

There is no requirement that the District Judge set forth his findings and conclusions in any formal type of memorandum. No such duty is imposed by any rule, nor has it been suggested by any Appellate Court. In the case of *United States v. Walker,* 19 F. Supp. 969 (W.D. Mo. 1937), the District Court Judge was not attempting, nor did he presume to have the power, to establish a new procedural rule for motions of this type. He simply expressed his personal belief that such a memorandum was desirable. It is interesting to note that, despite his belief, he disposed of the 74 grounds upon which the motion for new trial was based in very broad and inclusive terms, and in a very short memorandum.

That appellant failed to apply to the District Judge for any clarification or amplification of the order denying motion for a new trial makes it plain the order needed no clarification. The District Judge was simply not convinced that a new trial was justified. When the newly discovered evidence, so-called, is examined it is plain that the motion should have

been denied, whether or not for the reasons the trial judge had in mind. A judgment need not be affirmed solely upon the ground that seemed controlling to the lower court. *Wagner v. United States,* 9th Cir. 1933, 67 F. 2d 656, 657.

B. THE CORRISTON TESTIMONY IS NOT ADMISSIBLE.

Corriston, in his affidavit, related a number of conversations he had with William Gersh, during the course of which Gersh told Corriston that Wolcher wanted to get black market whiskey, that Wolcher had sent Gersh money to obtain such whiskey, and that Gersh had in fact obtained whiskey for Wolcher with the money Wolcher sent. Appellant contends that Corriston might testify to these extra-judicial declarations by Gersh, who was not a witness at the most recent trial of the case, under either of two exceptions to the hearsay rule, first, as declarations constituting a part of the *res gestae*, or second, as declarations of a co-conspirator. Neither ground is tenable.

1. The Gersh declarations recounted by Corriston are not admissible as part of the res gestae.

The theory of the so-called *res gestae* exception to the hearsay rule is plainly set forth in *Wigmore on Evidence,* 3rd Ed., Vol. VI, Section 1776, p. 177:

> "The true nature of the hearsay rule is nowhere better illustrated and emphasized than in those cases which fall outside the scope of its

> prohibition. The essence of the hearsay rule is the distinction between the testimonial (or assertive) use of human utterances and their non-testimonial use.
>
> The theory of the hearsay rule is that, when a human utterance is offered as evidence of the truth of the fact asserted in it, the credit of the asserter becomes the basis of our inference, and therefore the assertion can be received only when made upon the stand, subject to the test of cross-examination. If, therefore, an extra-judicial utterance is offered, not as an assertion to evidence the matter asserted, but *without reference to the truth of the matter asserted,* the hearsay rule does not apply." (Emphasis in the original.)

It is plain, then, that the condition precedent to the application of the *res gestae* rule is that the declarations to be admissible must be offered to establish only that the words were spoken by the declarant. The rule does not apply where the declaration is offered to establish the truth of what the declarant said, and in such a case the declarations are not admissible.

If the declarations of Gersh, as recited by Corriston, are considered "without reference to the truth of the matter asserted," the words are neither relevant nor material to any issue in the present case. It is only because of Gersh's narration of past events that any relationship to appellant is revealed. The testimony is offered to establish the very facts that Gersh recited: that Wolcher was having difficulty in

obtaining whiskey, that he asked Gersh to get the whiskey, and that he sent money to Wolcher for that purpose. The mere fact that the words were spoken has no probative value in this case. The declarations are probative only if it be assumed that Gersh spoke truthfully when he connected Wolcher to his supposed liquor transactions, but the assumption of truthfulness is an assumption that cannot be made without violation of the hearsay rule.

If there were any such arrangements as the Corriston affidavit suggests, whether between Wolcher and Gersh, or Wolcher and Mayer, or Wolcher and Taylor, or any arrangements between Gersh, Mayer or Taylor relating to Wolcher, they could be, as in fact they were in two cases, described by the direct testimony of the participants. But Corriston is not a participant, and he has knowledge only of what others have said about these arrangements. The existence of such arrangements cannot be established by hearsay declarations.

2. Declarations of one co-conspirator are not admissible in favor of another.

Appellant next contends that the declarations of Gersh, overheard by Corriston and referred to in the Corriston affidavit, are admissible as the declarations of a co-conspirator. The theory is that appellant and Gersh were engaged in an unlawful conspiracy to violate the price control laws and, accordingly, that the extra-judicial declarations of Gersh should be admitted in evidence *in favor of appellant* under the

rule that permits the acts and declarations of one co-conspirator to be used *against* another.

This theory indicates a misunderstanding of the principles of law which permit the use in evidence against a defendant of the acts or declarations of his co-conspirator.

The acts and declarations of co-conspirators amount to nothing more than admissions by the defendant or by persons with a certain privity of interest with him. *Wigmore on Evidence,* 3rd Ed., Vol. IV, Sec. 1069, pp. 68-69. These vicarious admissions stand in no different light, and are receivable on no different basis, than the admissions of the defendant himself.

The point of reference in determining the admissibility of such vicarious admissions is not the co-conspirator who made the statement but rather the defendant himself. If, for the purpose offered, the act or declaration, if made by the defendant, would be hearsay or self-serving, it must be held to be the same when made by another person in privity with him. On the other hand, if it would be admitted had it been made by the defendant, as in the case of an admission by him, then it will equally be admitted when made by his co-conspirator.

The mere fact that the statement, when made, may have been against the interest of the declarant is no ground for permitting it to be introduced in evidence. For example, the confession of guilt of a crime is against the interest of the declarant. But it has long been the law that a defendant may not introduce, in

his defense, the extra-judicial declaration of a third party confessing exclusive guilt for the very crime of which the defendant is accused.

Donnelly v. United States, 1913, 228 U.S. 243, reh. den., 228 U.S. 708;

Smith v. United States, 4th Cir. 1939, 106 F. 2d 726;

United States v. Mulholland, (D.C. Ky. 1892), 50 Fed. 413.

And it is logical that this should be so. The presumption of verity which surrounds admissions or vicarious admissions offered against the defendant in any particular case, is totally absent in cases where such admissions are offered on the defendant's behalf. The possibilities of collusion and the manufacture of so-called "declarations against interest" relating to crimes upon which the statute of limitations has run, or for which the declarant cannot be punished, are obvious.

Nor does *Mattox v. United States,* 1892, 146 U.S. 140 support appellant's position. The court there was not, as appellant suggests, considering whether a dying declaration could be offered by the defendant as well as by the Government, but rather was considering whether the particular dying declaration was admissible at all. It has never been questioned that dying declarations are a type of evidence that are receivable in evidence regardless of by whom offered. That this has always been the rule is indicated in the *Mattox* case at page 151 and by the cases there cited.

Appellant is not here asking that "no more rigorous rule" of evidence be applied to him than to any other litigant, but is rather asking that a completely new and illogical rule of evidence be especially designed for him to permit him to introduce evidence which contravenes the hearsay rule. Appellant is not the first litigant to make this request. It was tried before in *Nothaf v. State,* 91 Tex. Cr. Report 378, 239 S.W. 215. There, as here, a motion was made for a new trial on grounds of newly discovered evidence, and, quite properly, the court held that the proffered evidence was inadmissible because declarations of an alleged accomplice are not admissible as original evidence in favor of the accused.

Professor Wigmore disposes of the appellant's contentions (Vol. IV, Section 1049, p. 6), where he says:

> "The use of Admissions, is on principle not obnoxious to the Hearsay rule; for the reasons above stated in Section 1048.
>
> Nevertheless, because most statements used as admissions do happen to state facts against interest, judges have been found who were misled by this casual feature and treated admissions in general as obnoxious to the Hearsay rule, and therefore as entering only under an exception to that rule.
>
> That this is a mere local error of theory and in no sense represents a rule anywhere obtaining may be seen from three circumstances: first, that the limitations of the Hearsay exception to facts against pecuniary or proprietary interests have never been attempted to be applied to admissions; secondly, that the further requirement of the

> Hearsay exception, namely that the declarant must first be accounted for as deceased, absent from the jurisdiction, or otherwise unavailable, has never been enforced for the use of a party's admissions; and thirdly, that *if an opponent's Admissions fell under the protection of that Exception, they would be equally admissible in his favor; but of course they are not.*" (Emphasis added.)

C. THERE IS NO NEW EVIDENCE.

Even if it were thought that the affidavit of Corriston related to testimony which might be admissible at a third trial of this case, it nonetheless would not constitute such "newly discovered evidence" as would have justified the granting of the motion for a new trial.

In an attempt to establish the Corriston testimony as newly discovered, appellant, in his motion for a new trial, set forth (R. 11) that he "had no inkling that Mr. Corriston was involved in this matter in any way." But there is no materiality in the involvement of Corriston or in appellant's knowledge of it.

It is highly significant that appellant failed to allege in any of his moving papers that he was unaware of the transactions Gersh was talking about in his declarations to Corriston, or that he was unaware of the existence and material activities of Gersh, or of Frank Mayer, or of Garry Taylor, the persons referred to in the Corriston affidavit.

Appellant could not make any such allegation because the record affirmatively shows that he was

aware of the existence of at least two of them, both of whom testified at the first trial of the case. Gersh appeared as a witness at the first trial of the case, but was not called at the second trial. Frank Mayer also appeared as a witness at the first trial, was called by appellant as a witness at the second trial, but was not produced, nor was his testimony introduced in evidence, despite the fact that the prosecuting attorney offered to stipulate that Mayer's testimony from the first trial could be read into the record at the second trial.

At the first trial Mayer had testified that certain shipments of whiskey, totaling 1,000 cases, which had been distributed by a San Francisco wholesaler in accordance with appellant's instructions, had been sent to the wholesaler by Mayer and that this shipment resulted from a conversation he had with one Bill Gersh (pp. 404-407 Transcript of Record at first trial, No. 12992).

It is not correct, then, to state, as appellant does (App. Op. Br. p. 16), that Corriston "makes available for the first time" evidence which corroborates the testimony of appellant that Gersh participated in obtaining black market whiskey for him. Corroboration was available, certainly from Mayer and presumably from Taylor. Appellant, for purposes of his own, chose not to use it.

It cannot be the law that a defendant may withhold direct evidence of a fact at the time of trial and then obtain a new trial because he later discovers secondary evidence of the same fact.

The evidence now offered as "new" is merely indirect, secondary, and hearsay testimony which would be cumulative and to the same effect as direct, competent testimony which was available to appellant at the time of trial.

D. THE "NEW" EVIDENCE IS NOT SUFFICIENT, EVEN IF BELIEVED OR ADMISSIBLE, TO MAKE AN ACQUITTAL PROBABLE.

In the fall of 1943 price and production controls made necessary by World War II drastically reduced the amount of available liquor. Appellant who had direct, or indirect, relationships with numerous bar owners by virtue of the pinball and slot machine business he had operated for many years, found himself with some 5,138 cases of whiskey available for disposal. At least 3,764 cases of this whiskey were sold by appellant through his agents at prices far in excess of both the price permitted by law and the price for which appellant was billed by the wholesalers through whom he acquired the whiskey. Whiskey brought almost any price demanded for it in the black market. Purchaser after purchaser testified that he had not even asked what the price would be because he was anxious to get the whiskey at any price. Appellant admitted handling the whiskey, admitted selling it on the black market, admitted receiving over $228,000 for the liquor he sold on the black market, and admitted that none of these transactions was reflected in the books or records in any of his businesses, nor upon his tax return. His defense was that he did not make

a profit on these transactions, and, furthermore, that he at no time intended to make a profit, which was intended to explain his failure to keep the records that would have reflected whether a profit was or was not in fact made.

Is it at all surprising that two juries, without a dissenting vote, have found this defense to be inherently improbable? The suggestion that a shrewd, hard-headed, experienced business man of appellant's type would engage in so extensive illegal dealing in a commodity so widely demanded at any price the seller chose to assess, without the intention of making a profit, and without in fact making a substantial profit, is simply more than a jury can swallow.

The jury was well aware, from the evidence of witness after witness, that liquor was much in demand. This evidence, plus the testimony of appellant and the strenuous argument of appellant's counsel, made the jury fully aware of the likelihood that appellant could not have obtained such a quantity of whiskey without having made some arrangements, financial or otherwise, with someone. Whether or not the arrangements were with Gersh and whether or not *some* payments were made was not the controlling question. Appellant confessedly had evaded substantial taxes unless he paid out *the entire amount* of the profit he made on the black market transactions. The evidence is equivocal, to say the least, on the points of whether any money was paid, or whether any was paid to Gersh, but that *all* of the money was paid out is simply unbelievable. The character of appellant, the

nature of his regular business, the extent and dangers of the black market liquor transactions, the concealment inherent in demanding payment by check plus cash, and the lack of any supporting records, all lead inescapably to but one conclusion, that appellant made a substantial profit on these illicit transactions.

There is nothing in the so-called "newly discovered evidence" now being tendered by appellant that bears in any way upon this logical inference. The proffered evidence gives no clue as to the total amount appellant was required to pay if, in fact, he was required to pay anything. It fails completely to meet the basic evidence of guilt, that profit could have been the only motive for these widespread illegal activities.

And even assuming the truth of the defense evidence, which was to the effect that bonuses of $20.00 per case were paid upon the first four lots of whiskey appellant obtained, and that bonuses of $25.00 a case were paid on the last three lots, it would appear that appellant made and failed to report a profit of some $17,406.71. The computation of this profit is set forth in the appendix.

Appellant has never contended that the evidence against him was insufficient for conviction, nor could he so contend with any logic. The case against appellant is such that it is extremely unlikely that any jury could arrive at a conclusion different from that of the first two juries who have heard it. Even if the testimony of Corriston were deemed to be admissible, there is nothing about it so fundamental as to

make it seem probable that appellant would be acquitted on a retrial. On the contrary, the Corriston testimony relates only to the activities of others. It was for his own activities and the reasonable inferences to be drawn from them, that the appellant was convicted. Nothing Corriston could testify to can change that.

E. THE CHOTINER AFFIDAVIT NEITHER JUSTIFIED THE GRANTING OF A NEW TRIAL NOR REQUIRED THE DISTRICT JUDGE TO DIRECT THE UNITED STATES ATTORNEY TO PRODUCE HIS FILES FOR EXAMINATION.

Appellant filed, with his motion for new trial, an affidavit of Murray M. Chotiner. According to this affidavit the United States Attorney made the statement, after the second trial of appellant, that he had evidence that Gersh had received money from appellant which he had "passed on to people very high in the syndicate." The United States Attorney's answering affidavit states that he had knowledge of nothing more than suspicions, rumors and speculations concerning Gersh and that he had spoken about these matters not only to Chotiner after the second trial, but, on a number of occasions, about the same matters to other attorneys for appellant during the period between the first and second trials. As a result of these conversations, and, because of the arguments of appellant's counsel that William Gersh had testified falsely, the United States undertook to conduct an investigation to find whether or not evidence could

be discovered sufficient to justify a charge of perjury against Gersh. While the investigation disclosed certain rumors and speculation, it produced no evidence to show that Gersh had perjured himself. The affidavit of the United States Attorney continues with the following statements:

> "I did not then, nor do I now, have knowledge of any evidence, in the legal sense, other than the testimony adduced at the trials, to the effect that Mr. Gersh was engaged in black market liquor transactions. It was and is my opinion that during my conversation with Mr. Chotiner, and during my earlier conversations with Mr. Friedman and other representatives of the defendant, defendant's counsel had substantially the same information concerning suspicions, rumors, and speculations concerning Mr. Gersh as had the government, and that the government and defendant's representatives were lacking in any additional tangible or legally admissible evidence connecting Mr. Gersh with black market liquor activities.
>
> It has never been suggested to me by counsel for the defense, nor has it come to my knowledge in any way, that there is available evidence of any kind, except the defendant Wolcher's testimony, to establish that Mr. Wolcher made any payments to Mr. Gersh for the purpose of acquiring black market liquor."

These averments of the United States Attorney are uncontroverted.

Appellant does not now contend that the Chotiner affidavit constituted a sufficient showing to justify the

granting of the motion for a new trial. It is plain that it does not since, at best it merely suggests the possibility that there may be some additional evidence, but fails to set forth what it might be or what importance it might have.

Standing uncontroverted the Chotiner affidavit might well have justified an order by the court requiring the production of any evidence which the United States Attorney had in his possession that might have demonstrated the activities of appellant or of Gersh in their dealings with black market whiskey.

But the affidavit is controverted by the affidavit of the United States Attorney, which makes it clear, first, that he had advised other counsel for appellant before the time of the second trial of exactly the same matters that he had related to Chotiner after the second trial and second, and most important, makes it clear that he has no more information concerning the suspicions, rumors, and speculations about Gersh than do the attorneys for appellant, and that he has no knowledge of any available evidence of any kind, except the appellant's own testimony, to establish that appellant made any payments to Gersh for the purpose of acquiring black market liquor.

With these averments of the United States Attorney uncontroverted, the trial judge had no alternative but to accept as the fact that there simply was no evidence in the possession of the United States Attorney that might be reached by an order to produce and, accordingly, that such an order would be an idle gesture.

The situation here is the converse of the situation in *United States v. Rutkin,* 3rd Cir. 1954, 212 F. 2d 641, where on a motion under 28 U.S.C. § 2255 the defendant produced an affidavit alleging that the Government had in its possession certain contradictory statements of witnesses who had appeared in the trial. The defendant's motion there was disposed of without any showing by the United States Attorney as to whether or not such statements existed and the Court of Appeals simply remanded the matter with instructions to issue an order that such statements be produced "if such exist". The situation was much the same in *Griffin v. United States,* C.A.D.C., 1950, 183 F. 2d 990.

But the situation in the present case is entirely different. Here, the District Judge sitting as the trier of the fact, can only have found, on the uncontroverted affidavit of the United States Attorney, that the fact is that the thing demanded to be produced does not exist. The findings by the trial court on conflicting evidence on such a motion must remain undisturbed on appeal, except under most extraordinary circumstances, which do not exist here. *United States v. Troche,* 2d Cir. 1954, 213 F. 2d 401.

It must be remembered, too, that the Chotiner affidavit relates exclusively to the supposed relationship between the appellant and Gersh and touches in no way upon the Government's basic contention which was that it is impossible to believe that the appellant would have engaged in such extensive black market transactions in the manner in which he did, thus

exposing himself to danger of prosecution, unless those transactions had been profitable to him.

CONCLUSION.

As was said by this court in *Balestreri v. United States,* supra, at p. 918, "The motion for new trial was addressed to the sound discretion of the trial judge, and it thus being 'manifest the trial court did not act arbitrarily or capriciously nor upon any erroneous concept of the law, the Appellate Court may not substitute its judgment for that of the trial judge' *Gage v. United States,* 9th Cir. 1948, 167 F. 2d 122, 125."

The order denying the motion for new trial should be affirmed.

Dated, San Francisco, California,
February 16, 1956.

Respectfully submitted,

LLOYD H. BURKE,
United States Attorney,

ROBERT H. SCHNACKE,
Assistant United States Attorney,

Attorneys for Appellee.

(Appendix Follows.)

Appendix.

COMPUTATION OF PROFIT TO DOUGLAS E. THOMAS ON WHISKEY
SALES DURING YEAR ENDING 6-30-44, ASSUMING
ALLEGED "BONUSES" ACTUALLY PAID

May, 1943

Old Brook Whiskey, from Hathjen
(500 cases purchased, 300 cases sold during year ending June 30, 1944)

Received from Sales:			
300 cs @ 72.40			21720.00
Alleged Cost:			
Per invoice*			
300 cs @ 51.90		15570.00	
"Bonus"			
300 cs @ 20.00		6000.00	
Total			21570.00
Profit			150.00

July, 1943

Bourbon Supreme Whiskey from Mayer via Francisco Distributing Co.

Total sold by Francisco	100 cs		
Sold by Francisco at ceiling price	32 cs		
Balance resold by Wolcher on black market	68 cs		
Received from Sales:			
68 cs @ 55.00			3740.00
Alleged Cost:			
Per invoice			
68 cs @ 33.35		2267.80	
"Bonus"			
68 cs @ 20.00		1360.00	
Total			3627.80
Profit			112.20

August, 1943

Schenley Whiskey from Mayer via Francisco Distributing Co.

Total sold by Francisco	500 cs		
Sold by Francisco at ceiling price	165 cs		
Balance resold by Wolcher on black market	335 cs		
Received from Sales:			
335 cs @ 60.00			20100.00
Alleged Cost:			
Per invoice			
335 cs @ 38.23		12807.05	
"Bonus"			
335 cs @ 20.00		6700.00	
Total			19507.05
Profit			592.95

September, 1943

Golden Wedding Whiskey from Mayer via Francisco Distributing Co.

Total sold by Francisco	500 cs		
Sold by Francisco at ceiling price	50 cs		
Balance resold by Wolcher on black market	450 cs		
Received from Sales:			
450 cs @ 60.00			27000.00
Alleged Cost:			
Per invoice			
450 cs @ 34.50		15525.00	
"Bonus"			
450 cs @ 20.00		9000.00	
Total			24525.00
Profit			2475.00

*Invoice price in all cases includes freight, etc.

Total Profit forward . . 3330.15

Total Profit brt. forward . . 3

October, 1943

Gallagher & Burton Whiskey from Galsworthy via Francisco Distributing Co.

Total sold by Francisco	1000 cs		
Sold by Francisco at ceiling price	185 cs		
Balance resold by Wolcher on black market	815 cs		
Received from Sales:			
815 cs @ 60.00 (less 500.00 commission paid)			48400.00
Alleged Cost:			
Per invoice			
500 cs @ 30.50		15250.00	
315 cs @ 37.80		11907.00	
"Bonus"			
815 cs @ 25.00		20375.00	
Total			47532.00
Profit			8

November, 1943

Gallagher & Burton Whiskey from J & J Distributing Co. via Geo. Barton Co.

Total sold by Barton	500 cs		
Sold by Barton at ceiling price	136 cs		
Balance resold by Wolcher on black market	364 cs		
Received from Sales:			
364 cs @ 60.00			21840.00
Alleged Cost:			
Per invoice			
364 cs @ 30.50		11102.00	
"Bonus"			
364 cs @ 25.00		9100.00	
Total			20202.00
Profit			16

December, 1943

Rocking Chair Whiskey, from Penn-Midland Co., via Geo. Barton Co.

Total sold by Barton	2038 cs		
Sold by Barton at ceiling price	606 cs		
Balance resold by Wolcher on black market	1432 cs		
Received from Sales:			
1432 cs @ 60.00			85920.00
Alleged Cost:			
Per invoice			
1432 cs @ 26.92		38549.44	
"Bonus"			
1432 cs @ 25.00		35800.00	
Total			74349.44
Profit			11

Total Profit, Whiskey Sales 17